Supreme Court, U.S.
FILED

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No. _____

In The
Supreme Court of the United States

SEEMA L. MISHRA, M.D., et al.,

Petitioners,

v.

DOCTOR'S HOSPITAL OF AUGUSTA, LLC, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. In this action for declaratory relief for a meaningful declaration of rights in the face of litigation, to determine whether Plaintiff was an employee under an employment contract with no arbitration clause, that evidence showed she performed, or whether she was an independent contract physician, who owned her own practice and was borrower, under a Stark safe haven physician recruitment loan, with an arbitration clause, but with no delegation clause, was it error to compel arbitration without first making gateway determinations under 9 U.S.C. § 4 and as part of the declaratory relief sought, and where there were independent reasons to find the underlying agreement did not exist arising out of and attaching to parties associated with the employment contract and a joint venture?

II. Was it error not to use Article III prudential jurisdiction to prevent arbitration as to the Stark Act interests or compulsory servitude until to hold arbitration was consistent with public policy and law?

III. Was it error to find that the arbitrator did not exceed his authority, where he used language from the separate employment contract to account for the fact that material Stark safe harbor loan conditions were not met, where that was not permitted under the document with the arbitration clause?

IV. Was it error to grant judgment to the Hospital without first giving Plaintiff her day in court as to the claims existing outside the reach of arbitration, if any were covered by arbitration?

LIST OF PARTIES – RULE 14.1(b) STATEMENT

The following were parties to the proceedings in the United States Court of Appeals for the Eleventh Circuit:

1. Seema Mishra, M.D. – Plaintiff-Appellant, Petitioner
2. Seema Mishra, M.D. in representative capacity for patients, both private pay and those receiving Medicaid or Medicare for the federal government or financial assistance for health care from the State of South Carolina – Plaintiffs-Appellants, Petitioners
3. The Center for Primary Care, Inc. – Defendant-Appellee, Respondent
4. Jim C. Larson, Jr. – Defendant-Appellee, Respondent
5. HCA Inc. – Defendant-Appellee, Respondent
6. Doctors Hospital of Augusta, LLC – Defendant-Appellee, Respondent
7. d/b/a Doctors Hospital of Augusta – Defendant-Appellee, Respondent
8. John Doe, or any agent of HCA, Inc. – Defendant-Appellee, Respondent
9. Galen Holdco, LLC (parent company of Doctors Hospital of Augusta) – Defendant-Appellee, Respondent
10. Healthtrust, Inc. (parent company of Galen Holdco, LLC) – Defendant-Appellee, Respondent
11. The Hospital Company (parent company of Doctors Hospital of Augusta) – Defendant-Appellee, Respondent
12. Hercules Holding II, LLC (Majority Shareholder of HCA Inc.) – Defendant-Appellee, Respondent

13. Bain Entities (shareholder of Hercules Holding II, LLC (majority of shareholder of HCA Inc.) – Defendant-Appellee, Respondent
14. Bank of America/ML Entities (shareholder of Hercules Holding II, LLC (majority of shareholder of HCA Inc.) – Defendant-Appellee, Respondent
15. Frist Group (shareholder of Hercules Holding II, LLC (majority of shareholder of HCA Inc.) – Defendant-Appellee, Respondent
16. Citigroup Entities (shareholder of Hercules Holding II, LLC (majority of shareholder of HCA Inc.) – Defendant-Appellee, Respondent

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(TJOFLAT, J., EDMONDSON, J.,
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District Court order compelling arbitration as between only Dr. Mishra and Doctors Hospital. *Mishra v. Doctor's Hospital of Augusta, LLC*, No. 1:05-CV-101 (S.D. Ga. July 18, 2006) (Order compelling arbitration) (R6-86) 1a.[1] This order was timely appealed August 17, 2006. (R7-89).

Sua sponte the Eleventh Circuit dismissed, finding that the July 18, 2006 Order (R6-86) (1a) "compelling arbitration, staying the case, and dismissing some, but not all, defendants, was not final and appealable. See 9 U.S.C. § 16(b)(cites omitted)." *Mishra v. Doctor's Hospital of Augusta, LLC*, No. 06-14552-G (11th Cir. October 4, 2006) (R7-91) (63a).

District Court order denying reconsideration of the order compelling arbitration finding Petitioner "presented no [such] evidence" to make a "colorable" claim that the Stark Safe-Harbor Loan did not exist. *Mishra v. Doctor's Hospital of Augusta, LLC*, No. 1:05-CV-101 (S.D. Ga. October 16, 2006) (R7-92) 78a, 79a.

The Eleventh Circuit denied a motion for reconsideration of the *sua sponte* dismissal. *Mishra v. Doctor's Hospital of Augusta, LLC*, No. 06-14552-G (11th Cir. December 13, 2006) (R7-99) 81a.

Arbitration as between Dr. Mishra and Doctors Hospital was held December 7, 2007. Findings of Fact and Conclusions of Law were entered by the arbitrator April 16, 2008, finding in favor of Doctors Hospital. *Doctors Hospital of*

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[1] Reference to pages in the separate Appendix will be "[page number]a."

Augusta, LLC v. Seema L. Mishra, M.D., American Health Lawyers' Association Case No. A-042407-522 (Findings of Fact and Conclusions of Law April 16, 2008) (Oakley, Arb.) (R9-103 Ex. A or 103-1) 12a-42a.

The District Court confirmed the arbitration award March 26, 2009, finding in favor of Drs. Hospital against Dr. Mishra. *Mishra v. Doctor's Hospital of Augusta, LLC*, No. 1:05-CV-101 (S.D.Ga. March 26, 2009) (Order confirming arbitration award) (R9-127) 43a-55a.

On April 17, 2009, the District Court entered an order and judgment awarding principal and pre-judgment interest, on principal and attorney's fees, to Doctors Hospital-HCA. *Mishra v. Doctor's Hospital of Augusta, LLC*, No. 1:05-CV-101 (S.D.Ga. April 17, 2009) (R9-129) (56a) and (R9-130) (judgment) 116a.

A timely Notice of Appeal and an amended Notice of Appeal correcting a typo, were filed May 13, 2009. *Mishra v. Doctor's Hospital of Augusta, LLC*, No. 1:05-CV-101 (S.D.Ga. May 13, 2009) (R9-134).

The Eleventh Circuit issued its unpublished panel opinion on December 3, 2009, affirming the District Court's confirmation of the award to Doctors Hospital. *M.D. Seema L. Mishra v. Doctors Hospital of Augusta, LLC*, No. 09-12548 (11th Cir. December 3, 2009) (TJOFLAT, J., EDMONDSON, J., and HILL, J.). 60a.

A timely Petition for Rehearing or Rehearing *En Banc*, was filed December 24, 2009. *M.D. Seema L. Mishra v. Doctors Hospital of Augusta, LLC*, No. 09-12548 (11th Cir. December 24, 2009).

The panel denied rehearing on March 30, 2010. *M.D. Seema L. Mishra v. Doctors Hospital of*

Augusta, LLC, No. 09-12548 (11th Cir. March 30, 2010). 76a.

BASIS OF COURT'S JURISDICTION, TIMELINESS OF PETITION, AND ORIGINAL ACTION JURISDICTION

Petitioner certifies service upon the Solicitor General, Agency Director, and the Attorney General for the State of Georgia under Rule 29.4.

Jurisdiction for the Petition is based on 28 U.S.C. § 1254(1).

This is an appeal of an order compelling arbitration. 9 U.S.C. § 16(b); *see also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (granting certiorari after Court of Appeals affirmed in part and reversed in part order of district court compelling arbitration and remanded to district court for further proceedings).

The Petition for Certiorari is timely filed because the Petition was deposited in the mail or expedited delivery service on June 28, 2010, which is 90 days from March 30, 2010 (Sup. Ct. R. 13.1), when the Eleventh Circuit denied the timely filed Petition for Rehearing or Rehearing *En Banc*. *M.D. Seema L. Mishra v. Doctors Hospital of Augusta, LLC*, No. 09-12548 (11th Cir. Mar. 30, 2010). 76a.

The basis for jurisdiction in the court of first instance was under 28 U.S.C. §§ 2201 (declaratory and injunctive relief), 1331 (federal question), 1332 (diversity), 1343 (civil rights deprivations), and 1367 (supplemental). (R5-48-2) (First Amended Complaint).

The pleadings (R1-1 and R5-48) alleged Mishra was a resident of South Carolina and that she had signed an Employment Contract in October 2003 (132a-143a) with Respondent, The Center for Primary Care ("The Practice"), to work as an

employee at new office the existing practice opening in North Augusta, South Carolina. The evidence showed that in fact she did work as an employee under an Employment Contract – with no arbitration clause -- for the employer The Practice (132a-143a) and received only her salary and a small amount for moving expenses (197a, 198a, 201a), but nothing from the challenged loan and then was terminated in December 2004.

Mishra alleged she was fraudulently induced (R5-48-18 ¶ 139) to sign the Recruiting Agreement loan by a breach of fiduciary duty by The Practice and Respondent manager Jim Larson, under the operation of the Employment Contract, with no arbitration clause. Parties associated with the Employment Contract caused Mishra to sign the Stark Safe Harbor Recruiting Agreement Loan documents as an express condition of the Employment Contract (132a, Third Whereas clause) and by verbal representations that Larson had checked the Recruitment agreement documents, that the Hospital was helping with funding, "that it was all OK," and that it was in Mishra's "best interest to sign," and that the papers were "just like the papers that everyone in the practice had to sign, and that they all had done it." (122a).

The legal capacity and rights conflict as to whether she was an employee or independent contractor owner, requiring declaratory action, arises because in the Recruitment Agreement loan she had to "agree to relocate" and have the capacity of a physician "initiating a start-up initial practice" (175a) as an "independent contractor" (160a) of "his/her" practice (158a, 181a) and therefore owner, and borrower (167a, 172a). This is contrary to performance, where Dr. Mishra was performing as

an employee of The Practice. This is a capacity question for the court, if *Chastain v. Robinson-Humphrey Co.*, 957 F.2d 851 (11th Cir. 1992) is analogized as to the principle that the court decides legal capacity signing questions where clear policy exists, that she did not have the requisite Stark Safe Harbor capacity. *See W.R. Grace & Co. v. Rubber Workers, 461 U.S. 757, 103 S.Ct. 2177(1983).*

In separate and conflicting ways The Recruiting Agreement loan lists Augusta, Georgia (158a, 181a) and North Augusta, South Carolina (177a) as "the Community" to which Dr. Mishra was relocating.

Mishra did receive the loan principal, a failed Stark condition precedent. There are four checks paid to the order of CPC Attn (not "and") Dr. Mishra (R4-37-1 p. 16, 21, 26, 31) and three to Dr. Mishra with CPC in a line below, with no "and" or an "or," (R4-37-1 p. 37, 42, 45) but all checks were deposited in CPC's account, and returned to Drs. Hospital, including a "sign on" bonus of $20,000, that Mishra never received. R4-37-1 p.16. They were produced in discovery. R4-37. Mishra's declaration shows that she only received salary and a small amount of relocation pay. 197a-198a ¶4, 201a ¶¶29-31.

No Respondent has submitted evidence that Mishra received any of the loan principal. The record shows that Mishra only received salary to which she was entitled under the independent Employment Contract.

Petitioner Mishra like any borrower in any loan cannot, consistent with due process be subjected to further court control as to personal servitude, and a duty to repay a loan where she has shown that the lender knowingly paid the loan principal to a third party, and there was no evidence that it was "passed

through to" or controlled by the purported borrower, as required under the agreement. Therefore a court should decide whether the loan existed as to Mishra.

In the letter from counsel for The Hospital in June 2005 demanding arbitration, referring to paragraph 10 of the Employment Contract, to cover the fact that Mishra received no loan principal, The Hospital states:

> ...Your statement that "all payments were made to the Center for Primary Care" is incorrect. The checks prepared by the Hospital were made payable to "Seema L. Mishra, M.D." and to the "Center for Primary Care, Attn. Seema L. Mishra, M.D." Dr. Misrha's name was set forth on every check. Moreover, Dr. Mishra agreed in section 10 of her Employment Contract with the Practice that all payments under the Recruiting Agreement and Related Documents were to be made to the Practice...

R4-37-2. Before the Safe Harbor provisions of the Stark Act are met the performance must show that loan principal was "passed directly through to or received by" the physician independent contractor borrower. 42 C.F.R. 411.357(e)(4)(ii), The Hospital relied on terms in the separate Employment Contract, (139a & 140a; 151a & 152a) reflecting performance is hopelessly in conflict with the Recruiting Agreement, suggesting failure and material element or of a meeting of the minds. By express language of their Recruiting Agreement, the language from the Employment Contract cannot be a part of a Recruiting Agreement Loan. The

Recruiting Agreement Loan documents have a merger clause, (R4-37 p. 27 & 36; 163a, 183a) meaning that no other writings define the intent of the parties. The Employment Contract also has a merger clause, which excludes incorporation of the Recruiting Agreement. 154a.

The Arbitration was demanded under O.C.G.A. § 9-9-6(c) and warned Mishra that she:

> ...shall be precluded from denying the validity of the agreement between the parties or compliance therewith or from asserting limitation of time as a bar in court unless she makes application to the court within thirty (30) days for an order to stay arbitration...

Id. The Hospital relied on O.C.G.A. § 9-9-6(c)(3).

Where the District Court gave preference to the processing of Recruiting Agreement and never gave legal effect to the Employment Contract, this showed a procedural and resulting substantive preference to the Agreement with an arbitration clause, that had no delegation clause, that the record shows did not exist, that violates the principle of *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 109 S.Ct. 1248 (1989) that agreements with arbitration clauses not be given special treatment.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

U.S. CONST. ART I § 8 CL. 3

U.S. CONST. AMEND. I

U.S. CONST. AMEND. XIII §§ 1 & 2

U.S. CONST. AMEND. XIV § 1

28 U.S.C. § 2201 (Declaratory and Injunctive Relief)

42 U.S.C. § 1395nn (Stark Act)

42 U.S.C. § 1320a-7b (Anti-Kickback Act)

42 C.F.R. 411.357(e)(4)(ii) (Stark Safe-Harbor Physician Recruitment Reg.)

42 U.S.C. § 1994 (voluntary and involuntary peonage abolished and such debts void)

18 U.S.C. § 1589 (abuse or threatened abuse of law or legal process prohibited)

9 U.S.C. § 1

9 U.S.C. § 2

9 U.S.C. § 3

9 U.S.C. § 4

9 U.S.C § 10

STATEMENT OF THE CASE

PROCEEDINGS BELOW

On June 10, 2005, HCA sent a letter to counsel for Dr. Mishra demanding arbitration under O.C.G.A. § 9-9-6(c), (R1-1 p.4) and the rules for alternative dispute resolution of the American Health Lawyers Association, citing Par. 13 of the "Recruiting Agreement," which in pertinent part reads:

> 13. Any controversy or claim arising out of or related to this agreement, or any breach thereof, shall be settled by arbitration in accordance with the rules and procedures of alternative dispute resolution and arbitration established by the Alternative Dispute Resolution Service of the American Health Lawyers Association ("AHLA"), and judgment upon an award rendered may be entered in any court having jurisdiction thereof.

There is no delegation clause, therefore enforceability and existence issues are for the court. There is only a scope clause relating to "this agreement" if it is enforceable or is made. In addition O.C.G.A. § 9-9-6(c)(3) dictates that unless an action is filed in court within thirty days, one is "precluded from denying the validity of the agreement."

Petitioner plaintiff filed her initial complaint and decoration in support. (R1-1 and R1-3).

Respondent Doctors Hospital ("Drs. Hospital" or "The Hospital") filed a motion to dismiss or in the alternative to stay litigation and compel arbitration. (R1-9 & 10). The Hospital did not support their

motion with any declarations or other proof showing that Dr. Mishra had received the loan principal. Instead they relied on Plaintiff's documents.

They put forward no evidence to rebut the inference supporting a conclusion of a failed condition precedent, where in the face of resistance to arbitration The Hospital must demonstrate that the alleged borrower received or controlled the loan principal, before any duty of servitude to repay or to pay would attach.

In the first amended complaint (R5-48) Petitioner sought injunctive and declaratory relief through the following claims:

I. The Recruiting Agreement was void due to substantive and procedural unconscionability: (R5-48-12 & 13);

II. The contract was substantively unconscionable alleging it made a former employee a guarantor of the loan kept and received by a former employer arising out of the Employment Contract and abuse of that relationship. R5-48-13.

III. Alleged that O.C.G.A. § 9-9-2 (c)(9) requires that any contract arising out of an employment relationship with an arbitration clause be initialed to be valid (R5-48-13 & 14), where under the Tenth amendment states have authority to protect citizens from unwitting involuntary servitude through arbitration process, and that the same was not hostile to arbitration. R5-48-14.

IV. Asserted a failure of consideration because no loan principal was controlled by Dr. Mishra. R5-48-14 & 15.

V. Plaintiff asserted there was no new consideration as to the conditions that "her" practice be in Augusta, Georgia.

VI. Plaintiff asserted a right not to be subjected to compulsory servitude in violation of due process and equal protection, the right to travel and to free association with patients from South Carolina, under the First Amendment, and she asserted rights under the Thirteenth amendment prohibiting compulsory servitude. R5-48-17.

VII. Plaintiff asserted the dormancy clause, seeking protection from use of the commerce clause to compel arbitration, that effectuated servitude of a resident of a foreign state. R5-48-17 & 18. .

VIII. Plaintiff asserted defendant Larson tortuously interfered with her agreements with The Hospital. R5-48-17 & 18.

IX. Plaintiff asserted to the extent that Doctors Hospital was awarded damages, then The Practice and Larson were liable. R5-48-17 & 18.

X. Plaintiff asserted she was fraudulently led into signing the Recruiting Agreement by the practice and the first master treated her as an employee and therefore any agreement that treated her as an independent contractor under the second master of a joint venture was void and did not exist. *See Hodges v. Mayes*, 240 Ga. 643 (1978). R5-48-19.

XI. Plaintiff asserted there was no consideration for the amendment of July 2004 and therefore the amendment was non-existent. R5-48-19.

XII. Promissory estoppel.

XIII. Plaintiff sought damages for injury to her peace, happiness, and feelings for bad faith litigation.

The Order Compelling Arbitration R 6-86, 1a. The District Court acknowledged some of the Plaintiff's challenges to compelling arbitration, but did not address that many derived from parties

under the Employment Contract with no arbitration clause. R 6-86-4, 5a. In the court's discussion it cited 9 U.S.C. § 3 (R6-86-7 n. 9; 7a & 8a) but did not consider Petitioner's evidence as to theories challenging the loan's existence, that were court issues, such as failed consideration, formation and those arising from the Employment Contract and those parties, requiring court action or the summary trial § 4. R6-86-7, 7a. It did this even though at 4 it noted that the complaint asserted lack of consideration. R 6-86-4, 4a.

The Court did not consider the impact of the independent Employment Contract, nor discuss the distinction between money due under the independent Employment Contract versus loan principal that might have been forwarded by the Practice from the Hospital. See R 6-86-8 & 9, 8a & 9a. The court stated, "as a review of the amended complaint makes clear, all of plaintiff's claims concerning the enforceability of the arbitration clause, except for one [footnote 11] relates generally to the underlying recruitment agreement. Accordingly, I cannot consider Plaintiff' s arguments regarding the validity or enforceability of the contract. [footnote 12]." R 6-86-8 & 9, 8a & 9a.

In note 12 the Court misinterpreted plaintiff's assertion of violation of article 3 where the allegation is that the use of Article III power to compel arbitration, where the agreement has a loan forgiveness service provision, impacting a person and patients of a South Carolina practice, being told she has to practice in Georgia, or face a money judgment under Georgia arbitration law, challenges the implementation of the FAA on a dormancy clause and Thirteenth Amendment servitude basis. Plaintiff did not "raise a challenge to the

constitutionality of the FAA," as noted by the Court. R-6-86-9 n. 12, 9a & 10a.

The matter went up on appeal and was considered at this court as lacking jurisdiction because of lack of a final order. (R-91) (Eleventh Circuit No. 06-14552-G Oct. 4, 2006). This was error. *Arthur Anderson LLP v. Carlisle*, 1295 S.Ct. 1896 (2009)(Order denying stay of arbitration immediately appealable).

This part of the preceding may explain why the arbitrator acted as if the District Court had found that there was a unified contract, and that Plaintiff had appealed and that the Eleventh Circuit had ruled on the merits on that the servitude or peonage teenage argument. (R9-103-19 and 20). In arbitration Counsel for the Hospital argued that they had won on appeal and that this was an arbitrable dispute. (R8-19).

In par. 10 of the Award (R9-101 Ex. 4) the Arbitrator finds that paragraph 11, which is paragraph 10 of the executed Employment Contract, "states that all payments from the Hospital are to go to the Practice, which in turn paid Dr. Mishra's salary, benefits, insurance, etc.". 12a. There is no accounting for the impact of the right to independent pay.

The Arbitrator also used the Employment Contract to find that the general intent of Mishra was to be a guarantor for the former employer for the money received from the Hospital. R9-103-17 and 18; par. 39, 33a. This finding of general intent as to the Employment Contract is a matter which Mishra did not consent to be determined under the Arbitration Clause. The Arbitrator cannot interpret the Employment Contract and determine Mishra's

intent and therefore apply it to filling the gaps as to the RA.

The District Court confirmed the Arbitrator's Award addressing Stark law arguments at 6, partiality at 8, whether the arbitrator exceeding his authority at 9, manifest disregard for the law at 10, and refused to consider other of Plaintiff's reasons for reversal at 12. (R9-127, 43a).

The panel determined that, "Plaintiff did not substantiate her denial of the arbitration contract with evidence sufficient to made (sic) the denial colorable." *Mishra v. Doctors Hospital of Augusta*, No. 09-12548 (11th Cir. Dec. 3, 2009) at 2. ("Panel Order"). 60a. There was no discussion of the evidence of the obviously conflicting capacity documents. Order 2 and 3. The Court found Plaintiff did not show a breach of law` by the arbitrator.

District Court order compelling arbitration as between only Dr. Mishra and Doctors Hospital. *Mishra v. Doctor's Hospital of Augusta, LLC*, No. 1:05-CV-101 (S.D. Ga. July 18, 2006) (Order compelling arbitration) (R6-86) 1a.[2] This order was timely appealed August 17, 2006. (R7-89).

Sua sponte, the Eleventh Circuit dismissed, finding the District Court's July 18, 2006 Order (R6-86) (1a) "compelling arbitration, staying the case, and dismissing some, but not all, defendants, was not final and appealable. See 9 U.S.C. § 16(b)(cites omitted)." *Mishra v. Doctor's Hospital of Augusta, LLC*, No. 06-14552-G (11th Cir. October 4, 2006) (R7-91) (63a). Since then, this Court decided *Hall Street Associates, L.L.C. v. Mattel, Inc.* 552 U.S. 576,

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[2] Reference to pages in the separate Appendix will be "[page number]a."

128 S.Ct. 1396 (2008), which Petitioner asserts would have required the Eleventh Circuit to address the merits of the appeal of the District Court's Order compelling arbitration. This is significant because in the arbitration the arbitrator's Findings of Fact and Conclusions of Law follow the argument of counsel for Drs. Hospital and concludes that the District Court and the Eleventh Circuit had reached the conclusion that the dispute was arbitable.

The Arbitrator found that the case was arbitrable claiming that the prior appeal had been on the merits of arbitrability (R9-103-1 p. 7, 20) (19a-20a) and was res judicata on the issue of servitude. (R9-103-1 p. 19-20) 35a-36a. The Arbitrator found Plaintiff did not prevail on appeal regarding the peonage issue. (R9-103-1) 36a ¶ 48. Counsel for the Hospital argued "But we did wind up with an affirmed Eleventh Circuit--affirmance of the district court order that this is an arbitrable (sic) dispute." (R8-101-p. 19)

The record shows the appeal was dismissed for lack of jurisdiction because according to the panel, some, but not all, of the defendants were granted relief and the order was not a final order. *Mishra v. Doctors Hospital*, 11th Cir. No. 06-14552-G Oct. 4, 2006. (R7-91) 63a-65a.

The Eleventh Circuit denied a motion for reconsideration of the *sua sponte* dismissal sending the case to arbitration. *Mishra v. Doctor's Hospital of Augusta, LLC*, No. 06-14552-G (11th Cir. December 13, 2006) (R7-99) 81a.

CONSTITUTIONAL, STATUTORY, AND REGULATORY FRAMEWORK

While this is an arbitration case under the FAA, 9 U.S.C. §§ 1-16, and has existence, arbitrability, delegation clause, and other arbitration issues, more importantly, this is a specific performance[3] case of personal service physician, being required to move her practice to Georgia and the impact that it would have on patients. The premise for the demand for arbitration is the existence of a duty to repay. In this case servitude of a physician in a foreign state. Refusal of this servitude plus the state's arbitration law convert the refusal of servitude into a money judgment, to be domesticated, and sought to be enforced, subject to later jurisdiction challenges. It has questions about application of an act of Congress passed to protect the patient public to prevent "program and patient abuse." 42 U.S.C. § 1320a-7b (Anti-Kickback Act).

This is a jurisdictional dispute about mixed question of fact and law, that if left unresolved, undermine a demonstration of legitimate jurisdiction to compel arbitration. The suit is foremost an action for declaratory and injunctive relief filed by Petitioner to have the court determine in timely and meaningful manner whether she was a former

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[3] "Putting aside the constitutional and statutory peonage issues, this cases runs afoul of the long established, related principle that it is almost universal that a contract for personal services will not be specifically enforced. 5A Corbin, Contract § 1204, p. 398 (1964), D. Dobbs, Remedies, § 12.25, p. 929 (1973 Restatement (Second) Contracts § 3671; Annotation, "Specific Performance," 71 Am. Jur. 2d § (1973)." R6-65-6 & 7 n. 9.

employee, free to walk away from compelled servitude of a loan received and held by her former employee, or whether she owned the fees and practice and could seek injunctive relief for the loan proceeds and relief under law related to ownership interests in the pending litigation. Petitioner sought no benefits under the Recruiting Agreement loan, at one point, and was willing to exercise her right to seek employment elsewhere, walk away, and leave The Hospital and The Practice in their respective positions, with an existing practice and control of the loan principal, which The Practice still has.

Petitioner sought timely and meaningful resolution of the mixed question of fact and law, under the economic reality of the facts of actual performance, as to timely and meaningful resolution of whether she was an employee, or did she own the practice and the loan, or was she both,[4] so she could make tactical and economic moves to protect her interests.

Under the Stark Act if a physician or a practice group has a "financial relationship" with an "entity" it may not make a referral to the entity from which payment might be made through federal health care program. 42 U. S. C. § 1395nn(a)(1)(A).

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[4] In the facts were construed that she was an employee and did not own the fees, and that The Practice could disregard the Loan document and Stark regulations and not pass through to her, then that contract is unconscionable.

The unconcionability derives from the illusory ¶ 10 (139a) within the Employment Contract.

The claim for unconcionability goes to and derives from the Employment Contract -- with an arbitration clause.

Stark has reporting requirements, requiring that entities provide information concerning their ownership and investment interests at such times and manner that the Secretary shall specify 42 U. S. C. § 1395nn(f)(2) "[A]n ownership or investment interest" may be through equity, debt, or other means and includes an investment interest in an entity that holds . . . investment interest in any entity providing designated health service. 42 U. S. C. § 1395nn(f)(2)(B). The Anti-kickback act prohibits soliciting or receiving kickbacks, bribes, rebates, in cash or in kind, directly or indirectly to induce a referral where payment could be made under a federal health care program. 42 U.S.C. § 1320a-7b(b) (2) (A). Use of a physician as an employee when he should have an ownership interest is an in kind benefit as is the funding to an existing practice. The Hospital has provided a benefit in kind to help The Practice grow to grow market share. A physician will be considered to have relocated his or her medical practice if he has moved from more than 25 miles. In Dr. Mishra's case The Practice has been able to use a physician as an employee, and control the ownership interest the recruited physician would have had, and they have been able to pocket the difference between loan principal and salary, less allowable expenses.

The evidence showed that the Hospital could not show it "made" the loan or that the loan existed, because it could not show the loan principal was provided to the alleged borrower physician, or that the physician controlled the loan principal, as required by the loan agreement documents (Addenda July 2004, ¶ 3.1 Payments Remain with Physician; R.1-3; 191a) or by the law. 42 U.S.C. § 1001.952(nn)(e)(5)(C) (the physician recruitment

arrangement must "meet requirements as the Secretary may impose by regulation,") 42 C.F.R. 411.357(e)(4)(ii) ("Except for actual costs incurred by the physician or physician practice in recruiting the new physician, the remuneration is passed through to or remains with the recruited physician"); OIG Opinion letter No. 01-4 of May, 10, 2001 interpreting 42 U.S.C. § 1001.952(nn)(purpose of Stark loans is not "to lock up existing streams of referrals" from existing practices OIG Opinion letter No. 01-4 of May, 10, 2001 at page 7). The evidence shows an existing practice, growing through the employee – independent contractor financial arrangement.

Even before Mishra was recruiting through an ad run jointly by Drs. Hospital to "join the largest family medicine group in Augusta" (R3-32-5)(note the ad ambiguously states "join" and does not reference employment or ownership) and the purported lender under the Stark-proof Recruitment Agreement Loan and the joint venture of Drs. Hospital and The Practice, already had entered into nearly materially identical Employment Contracts and Recruiting Agreement Loans with nine physicians. R7-87 p. 11-35, 37-49 respectively.

These agreements start in 1998 (R7-87-1 p. 27) and the last one before Mishra was asked to sign the diametrically opposed purported agreements was in 2003. After Mishra executed her documents five more doctors have become employees under one document and independent contractos under the other, owning the practice. R7-87-1 p. 17-24, 31-32.

If the record, fairly construed, could show that there was some issue about whether all performance was not as an employee of The Practice or of the joint venture of The Practice and The Hospital under the Employment Contract, then a summary trial

under 9 U.S.C. § 4 should have been held to make the findings of fact, that become the findings of law, that establish on the record findings of standing in fact jurisdiction.

FACTUAL BACKGROUND

In two separate form documents,[5] Dr. Mishra was used by the Respondents in two diametrically opposed legal capacities. Dr. Mishra was an employee of The Practice in an Employment Contract – with no arbitration clause. The Employment Contract was formed performed and terminated. The other was a federally regulated Stark Act Safe Harbor Physician Recruitment Loan, with servitude forgiveness provisions -- with an arbitration clause, but without a delegation clause[6] –

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[5] There are two form Employment Contract documents created by The Practice. The first and only one performed is found at 132a of the Appendix.

Both the Employment Contract and the Recruiting Agreement Loan Documents are form contracts.

"[A]s a form document all ambiguity must be construed in favor of Mishra. *Hertz Equip. Rental. Corp. v. Evans*, 260 Ga. 532, 297 S.E.2d 692 (1990); *Belk & Co. v. Millender Sales Corp.*, 158 Ga. App. 522, 281 S.E.2d 287 (1981)." Brief for Appellant-Mishra at 18 filed July 6, 2009, *M.D. Seema L. Mishra v. Doctors Hospital of Augusta, LLC*, No. 09-12548 (S.D. Ga.).

[6] The challenged order compelling arbitration (1a) quotes the full text of HCA's form arbitration clause at 3 n.3, found in the Appendix herein at 3a:

> Any controversy or claim arising out of or related to this Agreement, or any breach thereof, shall be settled by arbitration in accordance with the rules and procedures of alternative dispute resolution and arbitration

> established by the Alternative Dispute Resolution Service of the American Health Lawyers Association ("AHLA"), and judgment upon any award rendered may be entered in any court having jurisdiction thereof. Such arbitration shall be conducted before a single AHLA Arbitrator selected jointly by the parties, or in the event the parties are unable to agree, designated by AHLA.

The arbitration clause is found in Recruiting Agreement HCA-462 ¶ 13, 164a.

While HCA's form arbitration clause does have the following claims covered clause, "Any controversy arising out of or related to this agreement or any breach thereof, shall be settled by arbitration," like the claims covered clause in *Rent-A-Center, West, Inc. v. Jackson*, S. Ct. No. 09-497, slip op. at 4 decided June 21, 2010, "providing for arbitration of all "past, present, or future" disputes arising out of Jackson's employment with Rent-A-Center," HCA's arbitration clause does not have what could fairly be construed to be a delegation clause, especially where ambiguity must be construed against the maker HCA.

The delegation clause in *Rent-A-Center* provides that "[t]he Arbitrator...shall have exclusive authority to resolve any dispute relating to the...enforceability...of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable." *Id.* There is no similar language in the HCA-462 form arbitration clause.

An argument of waiver cannot apply because Petitioner has continued to challenge the use of an arbitration clause in a non-existent or void agreement. Waiver cannot apply because the Stark Safe Harbor Physician Recruitment Loan documents have a provision preventing application of waiver, unless the waiver is established in writing. 183a, ¶ 8; 194a, ¶ 7.3.

that Petitioner asserts was not made, did not exist, or as a matter of prudential gatekeeping cannot be the basis for an Article III court to use its jurisdiction in violation of public policy in derogation of fundamental and statutory rights, by giving implicit governmental authority to any enforcement of such performance, that could result in "program or patient abuse," under Stark or involuntary servitude. *See W.R. Grace & Co. v. Rubber Workers,* 461 U.S. 757, 103 S.Ct. 2177(1983).

The Hospital In October 2003, Mishra, a resident of South Carolina (R1-31; 12a ¶ 3) entered an Employment Contract – with no arbitration clause (132a-142a; 143a-158a) to be an employee physician in a new office in North Augusta, South Carolina, for an existing group practice, The Center for Primary Care ("The Practice") that also had several offices in the Augusta, Georgia, area. (R1-3 p. 10). She performed in the capacity of a salaried, physician, employee for the existing practice under an Employment Contract – with no arbitration clause. (132a-142a; 143a-158a).

Under severability and the non-performance of the exacting conditions of the Stark Safe Harbor Loan by either the lender of the borrower, in essence the real challenge is specifically to the arbitration clause and its effect.

Rent-A-Center is further distinguishable because the employment contract in *Rent-A-Center* was "made or existed," where the claim was one for discrimination during employment.

Respondent, The Center for Primary Care,[7] used Dr. Mishra as an employee as a salaried physician in a new office The Practice[8] was opening in North Augusta, South Carolina, with the help of Drs. Hospital[9] under a one year Employment Contract – with no arbitration clause.

As a written condition of her employment[10] and Respondent Larson, a manager of The Practice, as a fiduciary induced Dr. Mishra to sign The

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[7] Respondents are Doctors Hospital of Augusta, LLC ("Drs. Hospital" or "The Hospital") and HCA, Inc. and The Center for Primary Care ("The Practice") and Jim Larson.

[8] The Practice had several offices in the Augusta, Georgia area and was an "existing practice." One of the conditions to meet the Stark Safe Harbor was that Stark Safe Harbor Physician Recruitment Loans could not be used to "lock up existing streams of referrals from existing practices. OIG Opinion letter No. 01-4 of May, 10, 2001 interpreting 42 U.S.C. § 1001.9529(nn) (purpose of Stark loans is not "to lock up existing streams of referrals" from existing practices OIG Opinion letter No. 01-4 of May, 10, 2001 at page 7)

[9] Dr. Mishra Dec 1 ¶ 15-18. 122a.

[10] The Employment Contract states that "this contract is contingent upon all parties signing additional separate agreements described in Paragraph 11 of this contract among Doctors Hospital of Augusta, Inc., Center for Primary Care, P.C. and the Doctor..." 132a & 143a. In Employment Contract I (2/1/04-1/31/05) the phrase references ¶ 10, which is at 139a & 140a, and in the second contract, that did not occur because The Practice terminated Dr. Mishra Dec. 17, 2004, (127a) the phrase (143a) references ¶ 11, found at 151a & 152a.

Hospital's Stark Safe Harbor Physician Recruitment Loan Form documents.

There is no evidence like an accounting in the record.

In Petitioner's First Amended Complaint (R3-48) the Petitioner first sought protection from being compelled to arbitrate and a trial if there were any issues as to whether she was an employee or an independent contractor under various statutes and Constitutional provisions in ¶¶ 1-8. In ¶ 10, Mishra sought to protect herself "in the alternative, Dr. Mishra was an independent contractor who owned her own practice in South Carolina and that one or more Defendants tortiously (sic) interfered with that right." R3-48. The Complaint also alleged

> 17. The agreement relates to an employment agreement of Plaintiff who was hired pursuant to and (sic) Employment Agreement as an employee of Defendant Center for Primary Care (hereafter "CPC"), who then fraudulently caused Plaintiff to become a dual agent by making her enter into a sham Recruiting Agreement with Doctors Hospital, as an independent contractor and responsible for a loan that Doctors Hospital would give to the Center for Primary Care to open an office in North Augusta.
>
> 18. The Center for Primary Care used Plaintiff as an employee physician at their North Augusta, South Carolina office, and then defendant Larson and CPC caused her termination as if she were an at will employee, in breach of

the original Employment Agreement, before Plaintiff could complete the full service of her terms under the Recruiting Agreement with Doctors Hospital.

19. That as a result Doctors Hospital now threatens to enforce a mandatory arbitration clause in the Recruiting Agreement, that was not initialed by the parties at the time of signing, alleging that Plaintiff has breached that agreement because she has not moved her practice to Augusta, although they have not tendered the money to Plaintiff, to operate a practice in Augusta or North Augusta

20. On about June 10, 2005, Defendant Doctors Hospital send Plaintiff a letter demanding that she arbitrate a dispute, and informing her pursuant to Georgia's Arbitration Act that unless she filed a challenged thereto within thirty days then should would waive her right to challenge mandatory arbitration.

21. This action is to prevent mandatory arbitration and ultimately to prevent enforcement of the Recruiting Agreement, as interpreted by Defendant Doctors Hospital, and/or for damages, and/or to hold Defendants Larson and the Center for Primary Care responsible for any monies the court might find Plaintiff owes Doctors Hospital.

R5-48 ¶¶17-21.

If the facts were construed such that she was an employee and did not own the fees, and that The Practice could disregard the Loan document and Stark regulations and not pass the principal through to her, then that contract is unconscionable. That unconcionability derives from the illusory ¶ 10 within the Employment Contract if a former employee has to repay a loan kept by the employer. The claim for unconcionability goes to and derives from the Employment Contract – with an arbitration clause.

It is not possible for Respondents to use ¶ 10 as of the Employment Contract (139a-140a) a panacea in the Employment Contract, even if there were no merger clause. The paragraph and related performance would still have to meet Stark. The clause is ambiguous and illusory, when it says "pursuant" to the agreements the "monies are to "supplement salary." The Recruiting Agreement is supposed to be a loan to Petitioner. Salary is an independent right under the rest of the Employment Contract, and there is no discussion in ¶ 10 about ownership of the practice/fees, or relocation capacity.

Under the RA loan and the ad to recruit a physician, run by Drs. Hospital and The Practice, which also shows the joint venture, states, "Join the largest family medicine group in Augusta...14 physicians..." Notice that the language is vague about being an employee or an independent contractor. R3-32-Tab1; New physicians to work in North Augusta.

REASONS TO GRANT PETITION

I. In this action for declaratory relief for a meaningful declaration of rights in the face of litigation, to determine whether Plaintiff was an employee under an employment contract with no arbitration clause, that evidence showed she performed, or whether she was an independent contract physician, who owned her own practice and was borrower, under a Stark safe haven physician recruitment loan, with an arbitration clause, but with no delegation clause, was it error to compel arbitration without first making gateway determinations under 9 U.S.C. § 4 and as part of the declaratory relief sought, and where there were independent reasons to find the underlying agreement did not exist arising out of and attaching to parties associated with the employment contract and a joint venture?

A. Petitioner sought declaratory relief of mixed questions of fact and law, was she an employee or independent contractor so she could protect her interests. Declaratory relief may not be arbitrarily derived on whim. *Hollis v. Otawamaba County Loans*, 657 F.2d 746, 750 (5th Cir. 1981).

B. To emphasize that resolution of mixed questions of fact in law under 9 U.S.C. § 4, and summary trial is an integral part of the FAA, and everyone's interest.

C. To correct the reach of *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 406 (1967)) and *Moses H. Cone Memorial Hosp. v.*

Mercury Const. Corp., 460 U.S. 1, 20 n. 23 (1983) so that their combined principles of discretion to control the docket if there are any challenges to compelled arbitration that "relate to the underlying agreement, allows the court to blithely treat its duty to address whether the underlying agreement was "made," or existed, as required by 9 U.S.C. § 4. Where one or more defenses to arbitration, or set of facts, raises "makings" or existence issues, that can fairly be said to have arisen out of occurrences, pre-existing relationships or agreements separate from the underlying agreement with the arbitration clause sought to be compelled, § 4 duties are essential.

D. To address whether a lack of capacity to enter a particular type of financial arrangement where the capacity is established by federal regulation under an act of Congress demonstrates a lack of signatory capacity, beyond the traditional, but limited use of the principle that lack of legal signatory capacity relates to age or mental infirmity.

E. To Show that broad scope of claim clauses cannot be argued to be delegation clauses, to attempt to close that floodgate.

F. Give meaning to efficient justice through meaningful and timely application of declaratory and injunctive relief under 28 U.S.C. § 2201, when there are factual challenges to jurisdiction that establish mixed questions of fact and law, and thereafter the legal duties and rights of the parties.

Petitioner filed this action for declaratory and injunctive relief and no order has addressed

directly why the District Court refused to make a finding as to whether Petitioner was an employee of The Practice or the joint venture of The Practice and The Hospital or whether she was an independent contractor who owned the fees and patient files in the practice she had "joined."

II. Was it error not to use Article III prudential jurisdiction to prevent arbitration as to the Stark Act interests or compulsory servitude until to hold arbitration was consistent with public policy and law?

A. Given greater government involvement in health care to hold a place in line for use of cares like *W.R. Grace & Co. v. Rubber Workers,* 461 U.S. 757, 103 S.Ct. 2177(1983) to protect patients and their relationships, when arbitration clause threaten fundamental rights.

B. Reintroduce dormancy clause as one of gate keeper duties of Article III Court's plenary jurisdiction to determine jurisdiction, and determine whether compelling arbitration is something that an Article III court can do and maintain its independence.

III. Was it error to find that the arbitrator did not exceed his authority, where he used language from the separate employment contract to account for the fact that material Stark safe harbor loan conditions were not met, where that was not permitted under the document with the arbitration clause?

A. Petitioner demonstrates the error of using reverse logic of parties behavior to define "intent of parties" rather than comparing the plain language of the agreement to the actual performance. This arbitrator used ¶ 10 from the Employment Contract, without proper construction of ambiguous terms in a form document, to justify a deviation from a federal regulation requiring that the loan principal be passed through to the physician.

This arbitrator has a former employee responsible to pay a loan his former employer kept.

The writ should be granted to review and correct the hard result to show the system has integrity.

B. To warn arbitrators to do their homework on arbitrability, *res judicata*, and other matters.

IV. Was it error to grant judgment to the Hospital without first giving Plaintiff her day in court as to the claims existing outside the reach of arbitration, if any were covered by arbitration?

A. To show that even if arbitration is compelled in a case with multiple parties, some of whom are not subject to arbitration, and an award is made, it may be judicious to resist entering judgment until other trials are held.

The preferences shown the Recruiting Agreement violate *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 109 S.Ct. 1248 (1989).

CONCLUSION

Reverse the judgment and award to the Hospital.

Find that arbitration should not have been compelled until mixed questions of fact and law were addressed under gateway functions to prevent the need to reach more prudential based findings to protect fundamental rights and public policy, where simple equitable and contract principles can answer the questions.

Order a summary trial under 9 U.S.C. § 4.